



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Thomas Schildgen, a/k/a
Leonard D.,¹
Class Agent,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense,
Agency.

Request No. 2024003121

Appeal No. 2021004597

Hearing No. 570-2021-00316X

Agency No. 2020-CONF-070

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2021004597 (February 15, 2023).

ISSUE PRESENTED

Whether the Agency's request for reconsideration of EEOC Appeal No. 2021004597 meets the criteria detailed in 29 C.F.R. § 1614.405(c).

BACKGROUND

During the relevant time, Class Agent was a Flour Corporation contractor working as a Warehouseman at the Agency's Camp Dahlke in Afghanistan.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On March 31, 2020, the Army Contracting Command-Afghanistan sent the Flour Corporation a Letter of Technical Direction (LOTD) to evacuate "high risk individuals" to their respective homes. The LOTD applied to those over 60 years of age and older and/or those who had a diagnosis or took medication for pre-existing medical conditions.

Shortly thereafter, in April 2020, the U.S. Central Command (USCENTCOM) issued Modification 15 (MOD 15) which updated medical deployment standards, including for civilian employees. Specifically, the Agency updated its fitness status requirements that, due to the "direct threat presented by COVID-19 and the significant risk of harm, fitness now includes being under the age of 65." In other words, individuals 65 years old or older were no longer considered to meet the fitness standard for approval to be deployed for overseas assignments located in particular Agency military facilities.

On April 18, 2020, Class Agent (born 1954) was notified that effective April 19, 2020, he was terminated from his position in Afghanistan based on a Not-Fit-for-Duty status under the Agency's new MOD 15 medical qualification standards.

Class Agent initiated the instant class complaint on November 9, 2020, regarding the Agency's updated fitness status requirements. The class complaint was forwarded to the EEOC. On November 25, 2020, the parties were ordered to submit additional information to assist in the determination of the appropriateness for class certification. Only Class Agent filed a response.

On July 6, 2021, an EEOC Administrative Judge (AJ) issued a decision to grant certification of the class. As an initial matter, the AJ found that the Agency was a joint employer with the Flour Corporation because the Agency exercised sufficient control over the putative class members.

The AJ then found that Class Agent satisfied the requirements for class certification. The number of potential class members appeared to satisfy the numerosity requirement because Class Agent asserted that between 100 and 2,700 individuals were directly impacted by the updated fitness requirement. They were also assigned to different organizational units or geographical sectors to make consolidation of individual complaints impractical. The AJ also determined that there were common questions of fact because the putative class members had their employment terminated as a result of the updated Fitness-for-Duty policy.

Further, Class Agent's claim was typical of the claims that each class member was expected to assert, and he had the same interest because he suffered the same injury as the members of the class. The AJ found that Class Agent's attorneys had sufficient legal training and experience to meet the adequacy of representation requirement. Moreover, the Agency did not challenge certification based on adequacy of representation.

The Agency issued a final order rejecting the AJ's decision. The Agency simultaneously filed an appeal challenging the Commission's jurisdiction, its joint employer status, and the AJ's class certification determination. Class Agent opposed the Agency's appeal.

In EEOC Appeal No. 2021004597, we reversed the Agency's final order. Regarding jurisdiction, the Agency asserted that the Commission lacked jurisdiction based on the matter being an "internal military decision." However, Section 717 of Title VII explicitly covers personnel actions affecting employees or applicants for employment in civilian positions within military departments. While the federal sector EEO complaint process did not apply to uniformed members of the military, it does apply to civilians, such as in this case.

The Agency was also deemed a joint employer of the putative class members because it exercised sufficient control over workers in overseas military bases, including controlling when, where, and how they performed their jobs and supplying the tools, materials, and equipment they used. While Class Agent asserted that the Agency had *de facto* power to discharge employees, the Agency argued that the Fluor Corporation had independent power to terminate or accommodate the impacted employees. The appellate decision determined that since the Agency's decision to revise the fitness-for-duty criteria effectively stopped the services of the putative class members and directly resulted in their termination from their private employer, the Agency exercised sufficient control over the employees for them to qualify as joint employees for the purpose of standing in the 29 C.F.R. Part 1614 EEO complaint process. Given the Agency's *de facto* power, and the absence of evidence indicating that Fluor Corporation made an independent decision to terminate Class Agent, the appellate decision concluded the Agency had sufficient control over Class Agent's employment to be deemed his common law joint employer.

The appellate decision further found that the class complaint met the criteria for certification.

Based on the Agency's centralized revision of its medical qualification standards, the appellate decision determined that Class Agent's claim encompasses the interests of the putative class to establish commonality. In addition, Class Agent's claim was typical of the class due to the alleged discrimination based on age and/or disability when the Agency revised its fitness-for-duty requirement to exclude those over the age of 65 and those considered "high risk." The Agency also did not dispute the number of employees involved to satisfy numerosity. In addition, the AJ properly determined that Class Agent's attorney met the qualifications to adequately represent the class, which was not contested by the Agency.

The appellate decision concluded by reversing the Agency's final order and remanding the complaint for further processing. In doing so, the appellate decision defined the class as follows:

All persons (except uniformed military personnel) who were removed from their overseas positions pursuant to the Agency's medical qualification standard prohibiting the presence of anyone age 65 or older.

The instant request for reconsideration from the Agency followed.

CONTENTIONS ON REQUEST

In its request, the Agency argues a clearly erroneous interpretation of law regarding whether the fitness-for-duty modification was an "internal military decision," which is outside of the Commission's jurisdiction. The Agency also asserts that whether the Commission may overrule a military fitness-for-duty requirement for contracting employees working in a designated area of combat operations will have a substantial impact on its policies, practices, or operations. The Agency further disputes the appellate decision's determinations that it is a joint employer and the certification of the class. Regarding the joint employer analysis, the Agency contends that the appellate decision's statement that the Agency did not provide evidence that the Flour Corporation made an independent decision to terminate Class Agent improperly shifts the burden to the Agency.

Class Agent opposes the Agency's request. Class Agent asserts that the Agency provided identical arguments and it largely refiled its appeal brief. Class Agent requests that the Commission reject the Agency's request and affirm the AJ's decision to certify the class.

STANDARD OF REVIEW

EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. See 29 C.F.R. § 1614.405(c).

ANALYSIS

We have reviewed the submissions by the Agency in support of the instant request for reconsideration. However, we determine that there is no reason to disturb the Commission's prior decision.

The Agency argues that the appellate decision contained a clearly erroneous interpretation of law regarding the Commission's jurisdiction based on an internal military decision. However, the appellate decision concluded that the instant class complaint was within the Commission's jurisdiction. While the Agency may have preferred a more extensive analysis, it has not established a clearly erroneous interpretation of law. The Commission has previously found jurisdiction when a complainant was not challenging the agency's "internal military decision," except as it resulted in disparate treatment. See Doviak v. Dep't of the Navy, EEOC Request No. 05860295 (Jan. 21, 1987). In addition, the Agency asserts that the military is better suited than the Commission to make determinations of fitness-for-duty in a war zone and allowing the Commission to overrule a military fitness-for-duty requirement for contracting employees working in a designated area of combat operations will have a substantial impact on the Agency's policies, practices, or operations. However, this case is not about the Commission overruling any internal military decision regarding a fitness-for-duty requirement, but the allegations of discrimination suffered by the purported class members based on age and/or disability when the Agency changed a fitness-for-duty requirement.

The Agency also contends that the appellate decision stated that the Agency did not provide evidence that the Flour Corporation made an independent decision to terminate Class Agent, which improperly shifts the burden to the Agency. However, a fair reading shows that the appellate decision noted this as an example of how the Agency had sufficient control over Class Agent's employment to support that the Agency was a common law joint employer.

Further, as noted by Class Agent, the Agency largely repeats its arguments raised on appeal. However, a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law or will have a substantial impact on the Agency's policies, practices, or operations. The Agency has not done so here with its reiteration of previous arguments, and we find that the appellate decision properly found that the Commission has jurisdiction; the Agency is a joint employer; and the class complaint met the criteria for certification.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the Agency's request. The decision in EEOC Appeal No. 2021004597 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER

The Agency is ORDERED to perform the following:

1. Notify class members of the accepted class claim within fifteen (15) calendar days of the date this decision is issued, in accordance with 29 C.F.R. § 1614.204(e).
2. Forward a copy of the class complaint file and a copy of the notice to the Hearings Unit of EEOC's Washington Field Office within thirty (30) calendar days of the date of this decision is issued. The Agency must request that an Administrative Judge be appointed to hear the certified class claim, including any discovery that may be warranted, in accordance with 20 C.F.R. § 1614.204(f).

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the Agency's actions.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title.

Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

September 26, 2024
Date